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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962

No. 105

DAGMAR READEY, HIRAM SCHMEDEL, CHRIS J. MUCKERMAN, HENRY J. JOHNSON, ROBERT BURKHAM, MIGNON E. DIETRICH and JACK WELCH, JR.,
Appellants,
vs.
ST. LOUIS COUNTY WATER COMPANY, a Corporation, and THOMAS C. DUNNE, MAURICE M. ABRAMSON, JOHN J. DOWLING, RICHARD A. HETLAGE, RUSSELL A. GRANTHAM, GEORGE E. BOHRER, JOHN F. MOLLOY, Members of the County Council of the County of St. Louis, Missouri; EDWARD A. WALSH, County Clerk of St. Louis County, Missouri and DR. C. HOWE ELLER, Acting Health Commissioner of the County of St. Louis, Missouri; and SUCCESSORS IN OFFICE,
Appellees.

Appeal from the Supreme Court of Missouri.

BRIEF OF THE APPELLANTS IN OPPOSITION TO APPELLEES' MOTION TO AFFIRM OR, IN THE ALTERNATIVE, TO DISMISS APPEAL OF APPELLANTS.

J. L. LONDON,
506 Olive Street, Suite 1711,
St. Louis 1, Missouri,
MA 1-1462,
Attorney for Dagmar Readey, Hiram Schmedel, Chris J. Muckerman, Henry J. Johnson, Robert Burkham, Mignon E. Dietrich, and Jack Welch, Jr., Appellants.

LOUIS L. HICKS,
7814 Forsyth Boulevard,
Clayton 5, Missouri,
PA 7-3766,
Of Counsel.

St. Louis Law Printing Co., Inc., 415 N. Eighth Street. CEntral 1-4477.

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BRIEF OF THE APPELLANTS IN OPPOSITION TO APPELLEES' MOTION TO AFFIRM OR, IN THE ALTERNATIVE, TO DISMISS APPEAL OF APPELLANTS.

APPELLEES' ARGUMENT UNTENABLE.

The appellees have not seen fit to answer most of the arguments of the appellants, but instead undertake to justify the opinion of the Missouri Supreme Court on the

theory that Article VI, Section 18 (c) of the Missouri Constitution may be overridden by a statute which was enacted by the Missouri legislature, namely Section 192.300, R. S. Mo., 1959, which shows on its face that it was enacted expressly for the purpose, as shown by the phraseology of the statute itself, of dealing with infectious, dangerous, and communicable diseases, and those would come under the rule of law laid down in the case of **Jacobson v. Massachusetts**, 197 U. S. 11, 25 S. C. 358, 49 L. E. 643, discussed on page 18 of appellants' Statement as to Jurisdiction:

The position of the Missouri Supreme Court, as appellants have heretofore pointed out in the Statement of Jurisdiction, is wholly untenable; in one breath the Court admitted that if Article VI, Section 18 (c) of the Missouri Constitution is the only law under which the ordinance in question was passed, then the position of the appellants would be correct, and the ordinance would be void.

Then the Missouri Supreme Court goes on to contend that Section 192.300 of the Missouri statutes is applicable, and therefore it argues that Article VI, Section 18 (c) of the Missouri Constitution is not violated, a position which is wholly inconsistent and at variance with the law and the facts.

Counsel for appellees have overlooked the fact that all authority given to the county to act under its charter was at all times subject to the constitutional provisions of the State of Missouri, including Article VI, Section 18 (c). Therefore, whatever powers the county acquired would be subject to the constitutional provisions of Article VI, Section 18 (c).

Furthermore, Article III, Section 22 (subsections 19, 20 and 24) of the Home Rule Charter for St. Louis County expressly limits the authority of the County Council, and

follows Article VI, Section 18 (c) of the Missouri Constitution, in describing the functions of said County Council, to-wit:—"**To provide the terms upon which the County shall perform any of the services** and functions of any municipality or political subdivision in the County, * * * **when accepted by a vote of a majority of the qualified electors voting thereon in such municipality or subdivision** * * *; to exercise legislative power pertaining to public health, police and traffic * * * **in the part of the County outside incorporated cities** * * *" (emphasis ours).

It will be noted that the phraseology in Article III, Section 22 quoted above is exactly the same as the phraseology of Article VI, Section 18 (c) of the Missouri Constitution:—"**when accepted by a vote of a majority of the qualified electors voting thereon in such municipality or subdivision.**" Thus the power of the County Council is limited not only by Article VI, Section 18 (c), but by the County's very own charter which follows Article VI. Obviously therefore, the Missouri Supreme Court has ignored not only the said Home Rule Charter of St. Louis County, but also Article VI, Section 18 (c) of the Missouri Constitution.

The appellees on page 7 of their Motion to Affirm and Alternative Motion to Dismiss, state that "no issue has heretofore been raised by the appellants in any of the lower courts as to their denial of the right to vote on the fluoridation measure involving the prohibition found in the Fourteenth Amendment to the Constitution of the United States."

Appellants are at a loss to understand how the appellees can make such a statement in the face of the record which shows that the appellants immediately raised the issue in their petition in the trial Court, and then kept it alive up to this time. As appellants have set out in their State-

ment as to Jurisdiction they continued to raise the point throughout the trial, in the Supreme Court of Missouri, and in this Court.

THE RIGHT TO VOTE A SUBSTANTIAL FEDERAL QUESTION.

Nor are the appellees correct in their statement (on page 7 of their Motion to Affirm, etc.) that "the determination as to whether or not a right to vote in the fluoridation measure, is one of local concern to be determined by the Missouri Courts and not one presenting a Federal question."

Toombs v. Fortson, U. S. D. C. Ga., May 25, 1962, United States Court of Appeals, Fifth Circuit (Unit System by which political party primaries were required to be held for the election of certain state officers). (See Sanders v. Gray, 203 F. Supp. 158.)

On the contrary, the Missouri Constitution having given the appellants the right to vote, that right cannot be denied by statute, so long as that right remains in the Missouri constitution. Therefore the federal question immediately arises, and is a most important question for this Court's consideration in the case at bar, since appellants have been deprived of their constitutional rights under Section I of the 14th Amendment, as pointed out in appellants' Statement as to Jurisdiction, page 23.

Not only does this ordinance violate the federal constitution, but also it violates Article I, Section 10 of the Missouri constitution, which is set out on page 3 of appellants' Statement as to Jurisdiction.

Where a statute or ordinance violates the federal constitution, as the ordinance in question does, a substantial federal question arises.

FLUORIDATED WATER FOR COOKING, WASHING, ETC.

It is interesting to note, on page 13 of appellees' Motion to Affirm and Alternative Motion to Dismiss, the following statement:

> "Plaintiffs, if they desire, may use the public water supply for **washing, cooking, bathing, sprinkling,** and other **general** purposes. They can easily secure **drinking water** from other sources." (Emphasis ours.)

What could be more absurd than to tell the people living in St. Louis County in the incorporated areas who have the right to vote and are deprived of the same by the action of the County Council, that after paying for fluoridated water, they may now go out and purchase water for drinking purposes, while they are told to use the fluoridated water for other purposes? This in itself is a deprivation of property without due process in violation of the 14th Amendment of the U. S. Constitution and of the equal protection guaranteed by the said amendment.

The inconsistency of the appellees is further apparent when although recommending that appellants may purchase their drinking water, they would also have the citizens of St. Louis County to use the fluoridated water for **cooking**, when the record shows that when fluoridated water is boiled as in **cooking**, that the percentage of fluoride is increased because it does not pass off in vapor as some other chemicals do, such as chlorine.

The opinion of the trial judge, the Honorable Douglas L. C. Jones, shows that for all practical purposes they would be forced to drink fluoridated water.

MISSOURI SUPREME COURT PASSED UPON THE 14TH AMENDMENT.

The Mo. Sup. Ct. ruled on the 14th Amendment (p. 44 of Jurisdictional Statement). The opinion holds (p. 45), that under the ruling of the Jacobson case, 197 U. S. 31, the freedom of choice here asserted may be validly restricted and is not limited or infringed here, or infringed where the restraint imposed is necessary in order to insure equal enjoyment of the same freedom by others or arises only under the "pressure of great dangers" or where necessary to protect the individual as well as the members of the general public from the danger of a communicable or contagious disease.

As we read the Jacobson case it holds just the opposite of the position taken by the Missouri Supreme Court.

PRIOR RULING OF MISSOURI SUPREME COURT ON ART. VI, MISSOURI CONSTITUTION.

In the case of **State ex rel. Shepley v. Clark R. Gamble,** 280 S. W. (2d) 656, Supreme Court of Missouri, en banc (1956), the Court said (l. c. 660):

> "A county under the special charter provisions of our constitution is possessed to a limited extent of a dual nature and functions in a dual capacity. It must perform state functions over the entire county and may perform functions of a local or municipal nature at least in the unincorporated parts of the county. These are constitutional grants which are not subject to, but take precedence over, the legislative power."

Thus, the constitutional provision takes precedence over a legislative enactment, a fact which the Supreme Court of Missouri failed to recognize in the case at bar.

The Court further states (l. c. 660):

> "The constitution is harmonious in recognizing an exception to the provision for general laws for the organization and classification of counties. Art. VI, Sec. 8."

Counsel for appellees, on page 8 of their Motion to Affirm and Alternative Motion to Dismiss, etc., quoted from **Shepley v. Gamble**, supra (l. c. 659), but they inadvertently failed to include the sentences which we have quoted above, which bear out appellants' argument that in the incorporated areas the County Council can only act through a vote of the qualified electors because of the constitutional grants and limitations.

In the case of **Pierce v. Society of Sisters**, 268 U. S. 510, 69 L.-E. 1071, 45 S. C. 571, the State of Oregon undertook to pass a compulsory education act which required every parent, guardian or other person having control of a child between the ages of eight and sixteen years to send him to the public school in the district where he resides. The Supreme Court of the United States held this to be an unreasonable interference with the liberty of parents and guardians to direct the upbringing and education of children under their control (l. c. 534), and in that respect a violation of the 14th Amendment. This Court held the fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only (l. c. 535).

In the **Pierce** case, the opinion clearly shows that the petitioners in that case had the right of choice and were deprived of it, just as in the case at bar where the appellants are deprived of their right to choose whether or not they will accept medicated drinking water, which would be their only source of drinking water, as a practical matter.

The appellees have also overlooked the vital testimony that there is a vast difference between natural fluoridated water and artificial fluoridated water. The evidence in the case at bar showed that artificial fluoridated water is many times more potent than natural fluoridated water.

CASES RELIED ON BY APPELLEES NOT APPLICABLE.

In the case of **Kaul v. Chehalis**, 45 Washington (2d) 616, 277 P. (2d) 352, the appellant did not question the findings of fact entered by the trial court. It was a 4 to 3 decision. An examination of the majority opinion shows that it is illogical. It is based upon the theory that the prevention and extermination of dental caries is within the police power of the state. There was no question of the **right to vote** involved, and the Court came out flat-footed and stated that the police power of the city was not limited to contagious diseases as distinguished from non-contagious diseases.

A dissenting opinion points out that there are Federal constitutional questions involved, and points out that "An employed home owner in Chehalis must consume fluorides added to the water supply, or surrender constitutionally protected property rights in home and employment, and move away (unless, of course, someone wants to suggest the quibble that such a person can buy bottled spring water)." (l. c. 364) * * * "Can the State or one of its subdivisions of government circumvent constitutional controls by devising a regulation which is practically incapable of avoidance, thereby making it unnecessary to prescribe a criminal penalty? If so, the area of governmental action thus released from constitutional fetters will be limited only by the ingenuity of man. If not, I do not see how this ordinance can stand."

This dissenting judge then points out that the majority opinion had overlooked "a very important limitation upon the exercise of the police power, which is that, whether the police power is being exercised for the protection of public health or for any other reason, it may not extend to the point of impairing a constitutionally guaranteed personal right, unless justified by 'conditions essential to the equal enjoyment of the same right by others', **Crowley v. Christensen,** 137 U. S. 86, 89, 11 S. Ct. 13, 15, 34 L. Ed. 620, or by 'pressure of great dangers', **Jacobson v. Massachusetts,** 197 U. S. 11, 25 S. Ct. 358, 362, 49 L. Ed. 643."

This opinion further points out that the Supreme Court of the United States has drawn a distinction between contagious and non-contagious diseases in the **Jacobson case,** supra (l. c. 365), "where it is shown that, because of the contagious nature of a disease, a serious threat to public health is presented, the tests referred to above for determining whether the exercise of the police power can extend to the impairment of personal rights, have been met. By necessary inference, where it is shown that a disease is not contagious, these tests have not been met, and the indicated limitation upon the exercise of the police power applies. The fact that dental caries is not a contagious disease is therefore material, since it is thereby established that the limitation on the exercise of the police power applies in this case." * * * "The case before us deals with what some will regard as a relatively minor aspect of dental health. But the principle announced is not so limited. * * * What future proposals may be made to treat noncontagious diseases by adding ingredients to our water supply, or food, or air, only time will tell. When that day arrives, those who treasure their personal liberty will look in vain for a constitutional safeguard."

The learned judge further points out that no referendum vote was taken, and based upon the result of votes taken

in other places, that it is to say the least, doubtful if such a program would meet with the approval of the people of Chehalis. The judge pointed out that nine of the eleven American communities which voted on the proposition turned it down. Among these nine cities were Atlantic City, New Jersey; Salem, Oregon; Greensboro, North Carolina; and Fremont, Nebraska.

In Birnel v. Town of Firerest, 53 Washington (2d) 830, 335 P. (2d) 819, 361 U. S. 10, 80 S. Ct. 71, 4 L. E. (2d) 51 (p. 16 of appellees), the opinion was a short opinion and followed the case of **Kaul v. Chehalis**, mentioned supra. Three judges, namely, Hill, Donworth and Foster, dissented for the same reasons set out in the Kaul case.

In the case of **Wilson v. City of Council Bluffs**, 110 N. W. (2d) 569, the Supreme Court of Iowa held that municipalities have only those powers expressly given them by the legislature, those arising from fair implication, and those necessary to carry out powers expressly or impliedly granted. A stipulation was entered into. There was no issue raised as to whether or not the fluorides would prevent dental caries, or whether or not the city acted arbitrarily or abused its discretion. There was no claim that the fluoride would make the water less potable or less pure. There was no issue raised concerning the amount of fluoride the city intended to add to the water or that it exceeded the amount recommended for the accomplishment of the reduction of dental caries. There was no issue raised as to plaintiff's authority to maintain the action. No issue was raised as to whether or not the city council was duly advised upon the question of whether or not adding fluorides to the water would be beneficial to the users (l. c. 570). There were only two questions before the Court: (1) the statutory authority of the City to enact said ordinance; and (2) violation of Chapter 205 of the code of 1958, I. C. A. The trial court held the City

had no statutory authority, express or implied, to enact the ordinance, but that, assume such authority, the ordinance did not violate Chap. 205. Obviously this was a "rigged" case.

Among the cases cited by appellee on page 15, is **Hamilton v. Regents of the University of California**, 293 U. S. 245, 55 S. Ct. 197, 79 L. Ed. 343, in which the Court says—(l. c. 258) that an appeal will not be dismissed for want of a substantial federal question unless the federal questions presented are clearly not debatable and utterly lacking in merit.

Certainly in the case at bar there is a strong federal question involved as pointed out above. The liberties guaranteed by both the Federal and State Constitutions as pointed out above are involved. It would be a work of supererogation to repeat them here. In the interest of brevity we refer to the discussions of them in the Statement as to Jurisdiction and to this reply brief.

In 54 American Jurisprudence, p. 700, § 45, the rule is thus stated:

> A Federal question is present in a controversy which draws in question the validity under the United States Constitution of an Act of Congress, a state statute, a municipal ordinance, or an order of a state administrative board or commission, as where it is claimed that such laws, ordinances or orders impair the obligation of contract, or violate the due process clause or the equal protection of the law clause of the Constitution. (Citing cases.)

LIBERTY DEFINED.

In the case of **Meyer v. Nebraska**, 262 U. S. 390, 67 L. E. 1042, 32 S. C. 625, the Court said (l. c. 399) in connection with a definition of liberty:

"While this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long **recognized at common law as essential to the orderly pursuit of happiness by free men** (citing cases). (Emphasis ours.)

CONCLUSION.

In conclusion, appellants respectfully submit that the opinion of the Supreme Court of Missouri is wholly illogical and untenable and violates the constitutional rights, both state and federal, of these appellants and those similarly situated as pointed out in the Statement as to Jurisdiction, and as herein set out.

The opinion of the trial court, on the other hand, is logical and recognizes the rights of appellants under Section I of the 14th Amendment to the Constitution of the United States, as well as the First Amendment to the Constitution of the United States. This means among other things equal opportunity to exercise political freedom and responsibility through the vote.

The questions involved are questions of the utmost importance to all of the people of the United States, since definite and important federal questions are involved, which touch a necessity of life, drinking water.

For the reasons set out in appellants' Statement as to Jurisdiction, and in this reply brief, this Court should

authorize the filing of briefs on the merits and hear early arguments.

Respectfuly submitted,

J. L. LONDON,
506 Olive Street, Suite 1711-19,
St. Louis 1, Missouri,
MAin 1-1462,
Attorney for Dagmar Ready, Hiram Schmedel, Chris J. Muckerman, Henry J. Johnson, Robert Burkham, Mignon E. Dietrich, and Jack Welch, Jr., Appellants.

LOUIS L. HICKS,
7814 Forsyth Boulevard,
Clayton 5, Missouri,
PArkview 7-3766,
Of Counsel.